SIMON CHARLES PICK v. GLOMAC REGAL SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22C-38-07-2014]
13 NOVEMBER 2014

CIVIL PROCEDURE: *Striking out – Application for – Discovery of defects on property – Property owner requested from local authority for documents related to issue of development order and certificate of fitness for occupation – No respond from local authority – Property owner claimed against local authority for breach of duties and responsibilities – Local authority applied to strike out action – Whether property owner disclosed reasonable cause of action – Whether matter private or public law – Whether local authority immune from liability under s. 95(2) of Street, Drainage and Building Act 1974 – Rules of Court 2012, O. 18 r. 19(a), (b) or (d)*

The plaintiff, the owner of a property and three other accessory parcels ('the said property') located at a condominium, had discovered various defects upon taking possession of the said property. Despite allegedly sending a list of the discovered defects to the first defendant, the latter failed to carry out remedial works. Further defects were discovered when the plaintiff carried out some renovation works. The plaintiff then requested from the third defendant, as the relevant authority, for several documents related to the issue of the development order and the certificate of fitness for occupation but the third defendant did not respond. The plaintiff claimed, *inter alia*, that the third defendant breached its duties and responsibilities under the relevant laws and regulations in issuing the development order and the certificate of fitness for occupation. By way of encl. 11, the third defendant applied to strike out the plaintiff's claim pursuant to O. 18 r. 19(a), (b) or (d) of the Rules of Court 2012 ('ROC') on the grounds that, *inter alia*, (i) there was no reasonable cause of action disclosed and therefore, the action was scandalous, frivolous and vexatious and/or an abuse of the process of the court; (ii) the plaintiff's claim was all about discovery and production of certain documents to support his case against the other defendants; (iii) its failure to respond to the plaintiff's letter did not warrant and permit the plaintiff to file the action in private law as the plaintiff's claim and complaints were necessarily public in nature. The third defendant further argued that it was immune from liability under s. 95(2) of the Street, Drainage and Building Act 1974 ('the Act').

Held (dismissing application)

(1) The plaintiff's claim against the third defendant was more than the matter of supply of the plans or drawings requested through the plaintiff's letter. It was an allegation that the third defendant had failed in its duties of which the plaintiff claimed to have suffered loss and damage from. (para 19)

(2) The third defendant claimed that it was protected from the plaintiff's claims in any case under several pieces of legislation. The merits of the defence were not under consideration but whether the plaintiff's claim had disclosed a *prima facie* good arguable case. If it had, it would not matter how weak the case might be as the court was only concerned with whether the plaintiff's case was of merit for trial. The court was not evaluating the defence. In any event, the defences were not such as to prohibit the claim without more. The third defendant's entitlement or reliance on such defences under the law would still require examination of facts which was simply not appropriate to be done at this time and in this manner. (paras 20 & 21)

(3) The arguments that the plaintiff's claim must necessarily be made under public law was not applicable. The plaintiff's complaints related to the alleged negligent and statutory breaches on the part of the third defendant. These matters were rightly raised under private law. (para 24)

(4) Sub-section 95(2) of the Act is not necessarily an absolute defence. The court will still have to hear the evidence. The court could not say for certain and without doubt that the plaintiff's case is obviously unsustainable in law and on the facts including under the Act. *Viva voce* evidence or further evidence would be warranted especially when dealing with the issue of whether the third defendant's actions have indeed been in accordance with the law. That issue was necessarily one which was of mixed fact and law. It was not enough for the third defendant to make such an assertion. The validity of its actions and decisions were under challenge and they must be scrutinised to ascertain if the plaintiff's claim was proved at all on a balance of probabilities. (para 24)

Case(s) referred to:

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Legislation referred to:

Public Authorities Protection Act 1948, s. 124
Rules of Court 2012, O. 18 r. 19(a), (b), (d)
Street, Drainage and Building Act 1974, s. 95(2)

For the plaintiff - V Jeya Kumar (Jonas Lee with him); M/s Kanesalingam & Co
For the 3rd defendant - Gayathri Chandrakasan; M/s Rao & Kamal

Reported by Najib Tamby

JUDGMENT

Mary Lim J:

Facts

[1] The plaintiff's claim is against four defendants. He is the owner of a property known as Unit S-15-1, Type A2, South Block together with three accessory parcels thereto known as SB-94, SB-110 and SB-111 located at Suria Stonor Condominium, No. 2 Lorong Stonor, 50450, Kuala Lumpur ('the said property').

[2] At para. 6 of the statement of claim, the plaintiff claimed that he bought the said property upon reliance of representations made by the first defendant found in its brochures, flyers, leaflets and/or through the first defendant's website. Those representations were that the first defendant and/or its holding company was reputed to be "one of the premier names in property development in Malaysia"; that Suria Stonor Condominium, constructed by the first defendant is a prestigious condominium and popular for expatriates for investment purpose; that Suria Stonor Condominium was of an innovative design with quality furnishings; that the purchasers of units of Suria Stonor Condominium could be assured of excellent sales and after sales customer service. The plaintiff bought the said property *via* a sub sale agreement from Progressive Berg Sdn Bhd.

[3] The plaintiff alleged that these representations were made with the intention of inducing foreign investors generally and/or the plaintiff specifically into making an investment by purchasing a unit and/or units in Suria Stonor Condominium.

[4] The said property was built by the first defendant, Glomac Regal Sdn Bhd, the developer of Suria Stonor Condominium. RSP Architects Sdn Bhd is the second defendant which was the architect appointed by the first defendant in respect of the development of Suria Stonor Condominium. Dewan Bandaraya Kuala Lumpur, the third defendant issued the development order and the certificate of fitness for occupation for Suria Stonor Condominium. Suria Stonor Condominium is managed and controlled by a management corporation known as Management Corporation of Suria Stonor, the fourth defendant in this case. The plaintiff secured part financing from Standard Chartered Bank Berhad for the purchase.

[5] Upon taking possession of the said property in mid January 2010, the plaintiff discovered various defects which he alleges are attributable to poor workmanship and materials used in the construction of the said property. The plaintiff claimed that he sent a list of discovered defects to the first defendant on 29 October 2010. By that list, the plaintiff required the first defendant to carry out rectification works.

[6] The plaintiff claimed that the first defendant failed to arrange for some suitably authorised officer to carry out a joint inspection of the said property and to identify and confirm the remedial works to be carried out. In the interim period, the plaintiff moved outstation and then overseas. The plaintiff claimed that he had intended to rent out the said property. However, he was unable to do so as the defects had not been rectified.

[7] As a result of this, the plaintiff claimed to have been under tremendous financial strain as he had to service the facility from Standard Chartered Bank Berhad while incurring rental expenditure during his employment in Australia since that employment did not include cost of accommodation. As part of his mitigation efforts, the plaintiff claimed that he was forced to leave Australia, return to Malaysia and resolve the dispute with the first defendant. The plaintiff claimed that the first defendant is in breach of its contract with the plaintiff when it has to date, failed to rectify the defects identified.

[8] The plaintiff claimed that he then decided to carry out some renovation works to certain areas of his said property. Such work had to be halted when the plaintiff claimed that he discovered further defects that were not visible from the surface and that some of the installation works were not up to standard. The details of the defects are set out at para. 20 of the statement of claim.

[9] The plaintiff alleged that a substantial portion of the construction works and materials used were defective; poorly installed or were not in compliance with specifications and design; improperly or negligently carried out. In particular, the plaintiff identified that the glass facade of the exterior of entire external side of Suria Stonor Condominium had been installed negligently as a result of which several panels had shattered and fallen from the building. The plaintiff claimed that the reinstallation works of the glass facade carried out by the first defendant were improperly carried out such that further damage was caused to the said property.

[10] The plaintiff alleges that the defects identified by the plaintiff were also a result of the second defendant's failure to supervise the first defendant's construction works including ensuring that all materials used were in accordance with the approved plans and specifications. The plaintiff also claimed that the second defendant had also failed to acknowledge the defects raised by plaintiff and that the second defendant did not take any positive steps towards ensuring that rectification works were done.

[11] The plaintiff claimed that he communicated with the defendants on all the matters that had been set out above. In respect of the third defendant, the plaintiff had requested for several documents related to the issue of the development order and the certificate of fitness for occupation by the third defendant. He also sought the assistance of the third defendant in settling the matter with the first and second defendants. The third defendant did not respond leaving it "with no alternative but to come to court to seek relief".

[12] It is the plaintiff's case that the third defendant is in breach of its duties and responsibilities under the relevant laws and regulations in issuing the development order and the certificate of fitness for occupation. Specifically, at paras. 40 to 42 of the statement of claim, the plaintiff alleges against the third defendant as follow:

> 40. The Plaintiff contends that the 3rd Defendant as a local authority owes a duty to all homeowners to ensure the buildings within its jurisdiction are safe for occupation and all construction works and materials used are in compliance with the relevant statutory enactments and by-laws and in event, constructed up to a reasonable standard.
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> 41. The Plaintiff states that he has, *vide* his solicitors letter dated 6.6.2014, conveyed to the 3rd Defendant the defects in the Unit S-15-1 as well as the Condominium. However, the 3rd Defendant has failed, neglected and/or omitted to take any necessary action to address the concerns so raised.
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> 42. In view thereof, the Plaintiff contends that the 3rd Defendant is negligent on the following grounds:
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> Particulars of Negligence of the 3rd Defendant
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> 42.1 Failing adequately or at all to ensure that the plans, drawings and the calculations pertaining to the Condominium submitted to the 3rd Defendant are in accordance with the Act and/or by-laws;
>
> 42.2 Completely disregarding and/or ignoring the real and valid complaints of the Plaintiff in respect of the serious and numerous defects in the said Condominium and in any event, failing to take any action against the 1st and 2nd Defendants for exploiting the interest of the Plaintiff as a homeowner;
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> 42.3 Enduring the irresponsible and lackadaisical attitude by the 1st and 2nd Defendants for not taking any remedial action toward the Plaintiff's complaints; and
>
> 42.4 Allowing the image and reputation of construction industry in Malaysia to be tainted in the eye of a foreign investor such as the Plaintiff.

[13] As for the fourth defendant, the plaintiff claimed that it had failed to maintain and manage Suria Stonor Condominium at all material times.

[14] The third defendant has filed its defence in which it *inter alia* pleaded that it has no knowledge of the plaintiff's complaints on the defects. Although the third defendant acknowledged being in receipt of a letter dated 6 June 2014 issued by the plaintiff's solicitor requiring the third defendant to furnish copies of documents submitted by the first defendant when it sought the third defendant's approval for the construction of Suria Stonor Condominium and also documents in relation to the issuance of the certificate of fitness for

occupation, the third defendant, as the relevant local authority, has no obligation and owes no duty towards production of any of those documents to the plaintiff. Further, some of the documents were no longer in the third defendant's custody. The third defendant claimed that at all material times, it had acted in accordance with the law.

[15] Enclosure 11 is the third defendant's application to strike out the claim pursuant to O. 18 r. 19(a), (b) or (d) of the Rules of Court 2012. The grounds of the application is that there is no reasonable cause of action disclosed; that the action is scandalous, frivolous and vexatious; and/or an abuse of the process of the court. The third defendant says that the plaintiff's claim is really all about discovery and production of certain documents to support his case against the other defendants. The third defendant claims that there is no legal relationship or nexus between the plaintiff and the third defendant for the plaintiff to maintain this action or to claim the reliefs sought against the third defendant.

[16] The third defendant also claims that the plaintiff has no right in law and/or on the facts to maintain this action against the third defendant; including forcing or interfering in the third defendant's general responsibilities. Any action against the third defendant must be by way of other proceedings such as judicial review. The third defendant is also relying on the action being time barred under "s. 124 of the Public Authorities Protection Act 1948"; and that it is immune from liability under s. 95(2) of the Street, Drainage and Buildings Act 1974.

Determination

[17] The law on striking out is not only well settled; it is trite – see *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36. The application will be allowed where it is plain and obvious that the plaintiff's claim is obviously unsustainable in law or on the facts.

[18] The plaintiff's claim against the third defendant is in relation to its duties and functions as a local authority cloaked with various powers and duties under the relevant laws. The third defendant claimed that all that the plaintiff is interested in are certain drawings or plans which the plaintiff had sought through its letter dated 6 June 2014. The third defendant did not reply to that letter. The third defendant claimed that such failure, if at all, does not warrant and permit the plaintiff to file the present action in private law. It is the third defendant's argument that the plaintiff's claim and complaints are necessarily public in nature; in which case, the plaintiff must and can only challenge the third defendant's actions through judicial review. Details of these pleas can be found at paras. 10, 16 and 19 of the defence:

> 10. With respect to paragraphs. 27.7 and paragraph 28 of the statement of claim, the 3rd defendant repeats paragraph 8 above. The 3rd defendant states in any event that they are not obliged in law and/

or in fact to furnish the documents requested to the plaintiff and that his request was in truth "a mere fishing expedition" for pre-action discovery of documents.

16. Paragraphs 42, 42.1, 42.2, 42.3, 42.4 and the "Particulars of Negligence of the 3rd Defendant" of the Statement of Claim are wholly denied and the Plaintiff is put to strict proof of his allegations. In reply, the 3rd Defendant states as follows:

(i) the 3rd Defendant states that at all material times, they had acted in accordance with the law;

(ii) further and/or alternatively, the 3rd Defendant shall refer to and be relying upon section 95(2) of the Street, Drainage and Building Act 1974;

(iii) the 3rd Defendant is not bound and/or obliged in law and/or in fact to take action against the 1st and 2nd Defendants (if any);

(iv) the 3rd Defendant is not bound and/or obliged in law and/or in fact to act to protect the "image and reputation of the construction industry in Malaysia".

19. Paragraphs A (a), (b) and (c), B, C, D (a) and (b), E, F, G and H of the Statement of Claim are not admitted and the Plaintiff is put to strict proof thereof. The 3rd Defendant states that insofar as relates to the 3rd Defendant, the Plaintiff is not entitled in law and/or in fact to the reliefs claimed. In particular, the 3rd Defendant states as follows:

(i) The Plaintiff's claim is one for discovery only and the claim discloses no reasonable cause of action;

(ii) there is no legal relationship and/or nexus between the Plaintiff and the 3rd Defendant entitling him to make and/or file this claim against the 3rd Defendant and/or claim the relief sought;

(iii) The Plaintiff is not entitled in law and/or in fact to file and/or maintain this action/claim against the 3rd Defendant. Any grievance that the Plaintiff has against the 3rd Defendant (if any) ought properly to have been taken up by an application for judicial review or any other procedures set out under the law.

(iv) The Plaintiff has no right in law and/or in fact to compel and/or interfere with the public duties of the 3rd Defendant.

(v) The 3rd Defendant is immune from liability (if any) by reason of section 95(2) of the Street, Drainage and Building Act 1974.

(vi) The Plaintiff has no right in law to file and/or maintain an action against the 3rd Defendant as the action/claim is time barred. The 3rd Defendant shall rely upon section 124 of the Public Authorities Protection Act 1948.

[19] With respect, the court disagrees. The plaintiff's claim against the third defendant is more than the matter of supply of the plans or drawings requested through the plaintiff's letter. It is an allegation that the third defendant had failed in its duties in the manner as set out at paras. 40 to 42 of the statement of claim. The plaintiff claims to have suffered loss and damage by reason of such failure.

[20] The third defendant claims that it is protected from such claims in any case under several pieces of legislation; for example s. 95(2) of the Street, Drainage and Building Act, 1974 and s. 124 of the Public Authorities Protection Act 1948 (should be, if at all, s. 2(a)).

[21] It is the view of the court that the merits of the defence are not under consideration; but whether the plaintiff's claim has disclosed a *prima facie* good arguable case. If it has, it does not matter how weak that case may be as at this point in time, the court is only concerned with whether the plaintiff's case is of merit for trial. The court is not evaluating the defence. In any event, the defences are not such as to prohibit the claim without more. The third defendant's entitlement or reliance on such defences under the law still require examination of facts which it is simply not appropriate to do so here; at this time and in this manner.

[22] Further, the arguments that the plaintiff's claim must necessarily be made under public law is not applicable here. The plaintiff's complaints relate to the alleged negligent and statutory breaches on the part of the third defendant. The plaintiff claims that as a registered unit owner and a rate payer, he is entitled to rely on the third defendant to carry out its statutory duties properly and to seek relief from the court where he feels there has been failure or breach. The plaintiff in his affidavit in reply has cited reliance on the Street, Drainage and Building Act 1974; the Building (Federal Territory of Kuala Lumpur) By Laws 1985; and several other legislations for his contention of breach or failure on the part of the third defendant.

[23] These are matters rightly raised under private law. The law journals are replete with cases of that nature. To see for example, *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389. Whether or not the plaintiff will succeed in his allegations and contentions under these laws remains to be seen. It cannot be said and certainly not as a sure thing or absolutely, that the plaintiff's claim is bound to fail.

[24] Further, sub-s. 95(2) of the Street, Drainage and Building Act 1974 [Act 133] is not necessarily an absolute defence. The court will still have to hear evidence on this. Subsection 95(2) states:

> (2) The State Authority, local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that

such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

The Court cannot, on the applicable test, say for certain and without doubt that the Plaintiff's case is obviously unsustainable in law and on the facts including under Act 133. The Court is of the view that *viva voce* evidence or further evidence would be warranted especially when dealing with the issue of whether the 3rd Defendant's actions etc have indeed been in accordance with law. That issue is necessarily one which is of mixed fact and law. It is not enough for the 3rd Defendant to make such an assertion. The validity of its actions and decisions are under challenge and they must be scrutinised to ascertain if the Plaintiff's claim is proved at all on a balance of probabilities.

[25] In the circumstances, the application is dismissed with costs in the cause.